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Implementing Article 32 of the Convention on the Rights of the Child as a Domestic Statute: Protecting Children from Abusive Labor Practices

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IMPLEMENTING ARTICLE 32 OF THE CONVENTION ON THE RIGHTS OF THE CHILD AS A DOMESTIC STATUTE: PROTECTING CHILDREN FROM ABUSIVE LABOR PRACTICES

*Hillary V. Kistenbroker**

Child labor exists everywhere, even in the United States. Exemptions in the Fair Labor Standards Act chip away at the law's effectiveness and create loopholes for abuse, particularly with children employed in agriculture. Article 32 of the Convention on the Rights of the Child provides that children have the right to protection from "economic exploitation" and hazardous labor. This Note examines the need for improvement in federal child labor laws and why such reform is important to protect children at home and abroad. Congress should implement a domestic statute embodying the functionalities of Article 32 of the CRC, as such a statute would help establish and enshrine the CRC's protections and mirror emerging norms in international law. Such a law would serve as a model for other countries and stand as a powerful vindication of America's commitment to international human rights.

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I. INTRODUCTION

The Seventh Circuit's decision in *Flomo v. Firestone Natural Rubber Co.* stunned children's rights advocates around the world when it declined to hold Firestone liable for exploiting twenty-three Liberian child laborers.¹ The plaintiff children worked at Firestone's rubber plant and filed suit against the company pursuant to the Alien Tort Statute (ATS).² They alleged Firestone's plantation used hazardous child labor in violation of customary international law.³ Firestone tacitly encouraged such employment by setting high daily production quotas for its "legal" employees, who were primarily poor Liberian agricultural workers.⁴ To ensure that they met daily quotas, workers would hire other Liberians cheaply, or, alternatively, "draggon their wives or children into helping them, at no monetary cost."⁵

While working on the Firestone plantation, the children used machetes to cut the bark off of rubber trees and drain the latex into large

¹ *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); James Warren, *Well-Known Judge Stuns in Ruling on Child Labor*, N.Y. TIMES, July 15, 2011, at A19; Noel Tripp, *Seventh Circuit Affirms District Court's Rejection of Child Labor Claim Based on Work Performed in Africa*, JACKSON LEWIS LLP (Aug. 5, 2010), <http://www.wageandhourlawupdate.com/2011/08/articles/wage-and-hour/coverage/seventh-circuit-affirms-district-courts-rejection-of-child-labor-claim-based-on-work-performed-in-africa/>.

² 28 U.S.C. § 1350 (2006). The ATS gives district courts original jurisdiction over "any civil action brought by an alien for tort only, committed in violation of the laws of nations or a treaty of the United States." *Id.*; see generally RALPH GUSTAV STEINHARDT & ANTHONY A. D'AMATO, *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* (1999) (offering background information and various explanations and interpretations of the ATS).

³ *Flomo*, 643 F.3d at 1015.

⁴ *Id.* at 1023.

⁵ *Id.*

buckets.⁶ The children also sprayed trees with fungicides and various other potentially toxic chemicals without any safety equipment.⁷ After the lawsuit was filed, Firestone's president admitted that each worker would tap about 650 trees per day, which amounts to approximately twenty-one hours of labor.⁸

While the Seventh Circuit found that corporations could be held liable under the ATS, the court did not hold Firestone liable for violating the law of nations.⁹ The court acknowledged that although the labor was clearly "hazardous," the case nevertheless had to be dismissed.¹⁰ Writing for the court, Judge Richard Posner explained that current sources of international law regarding child labor did not allow him to "distill a crisp rule."¹¹ This

⁶ *Id.* at 1024; Warren, *supra* note 1. A typical work day would begin around 4 AM and end in the late afternoon. Jonathan Stempel, *Firestone Wins Liberian Child Labor Case in U.S.*, THOMSON REUTERS, (July 12, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/07_-_July/Firestone_wins_Liberian_child_labor_case_in_U_S_/.

⁷ Flomo, 643 F.3d at 1024; Warren, *supra* note 1.

⁸ Warren, *supra* note 1.

⁹ Flomo, 643 F.3d at 1024. The portion of Judge Posner's opinion addressing ATS liability largely responds to the Second Circuit's controversial holding in *Kiobel v. Royal Dutch Petroleum Co.*, which rejected the proposition that corporations can be held liable under the ATS for violating customary international law. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011). The Seventh Circuit criticized the result in *Kiobel* as "incorrect" and an "outlier." Flomo, 643 F.3d at 1017.

¹⁰ Flomo, 643 F.3d at 1024. The court also discussed whether the plaintiffs had given enough information to show that violations of international child labor occurred on the plantation. The court explained that it had little basis for comparison in the quality of life between children who worked on the plantation and children who did not. Judge Posner wrote, "[W]e don't know the net effect on their welfare of working on the plantation." *Id.* While an interesting question, it seems to undervalue the danger that children on the plantation faced. Just because the children may have had a better quality of life on the plantation does not negate the fact that children as young as six were allowed to use machetes and haul heavy buckets of latex for great distances. Moreover, the fact that at least some of the children were "dragooned" by their fathers into working on the plantation seems tantamount to forced labor. There is an international consensus against corporations forced labor, as described in the Convention Concerning Forced or Compulsory Labour. *See* Convention Concerning Forced or Compulsory Labor, art. 5, June 28, 1930, 39 U.N.T.S. 55 ("No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade."). 175 countries have ratified the Convention. *Ratifications of C029—Forced Labor Convention, 1930 (No. 29)*, INT'L LABOR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:4127467660166947::NO:11300:P113_00_INSTRUMENT_ID:312174 (last visited June 24, 2012).

¹¹ Flomo, 643 F.3d at 1023. The court examined three international conventions: Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 298; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161. The court also examined Recommendation 190, which supplements the Convention Concerning the

lack of a clear international principle made it difficult for the court to determine which actions violated international law.¹²

Although the international community has made much advancement in recognizing and protecting children's rights,¹³ *Flomo* illustrates that some courts are hesitant to acknowledge that international child labor law has risen to the status of custom enforceable under the ATS. This is particularly true with respect to Article 32(1) of the Convention on the Rights of the Child (CRC), which recognizes a child's right to protection from exploitation or labor, which might harm his development.¹⁴ The Seventh Circuit criticized Article 32's language as "too vague and encompassing to create an international legal norm."¹⁵

The purpose of this Note is to propose that Congress should codify a domestic statute implementing the same functionalities as Article 32 of the CRC, as such a statute would help establish and enshrine the protections therein and mirror emerging norms in international law. Part Two explains why the U.S. has failed to ratify the CRC as a whole and analyzes the text of Article 32 in depth. Part Three of this Note establishes why current child labor laws in the U.S. and other countries provide inadequate protection. Part Four examines the extent to which U.S. law already complies with Article 32 and discusses areas for improvement. Finally, Part Five proposes a new domestic statute and explains how it would be beneficial, drawing on a comparison to the Torture Victim Protection Act of 1991.

Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Recommendation 190 specifies that conditions such as long hours, exposure to harmful chemicals, and excessive noise levels are likely to harm children's health and safety. However, the court declined to apply Recommendation 190, as it created "no enforceable obligations" on states party to the Convention. *Flomo*, 643 F.3d at 1023–24; International Labour Organization, Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Recommendation 190 (June, 17, 1999), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm>.

¹² See *Flomo*, 643 F.3d at 1024 ("[W]e have not been given an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court's insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

¹³ See GERALDINE VAN BUREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 1–25 (1995) (explaining the historical development of international law on children's rights); see also Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 162–64 (2006) (explaining the U.N.'s historical significance after World War II and the role that the U.N. plays in protecting human rights). Eliminating child labor is part of the U.N.'s Millennium Development Goals. See G.A. Res. 65/1, ¶ 70(f), U.N. Doc. A/RES/65/1 (Oct. 19, 2010).

¹⁴ See, e.g., CRC, *supra* note 11, art. 32(1).

¹⁵ *Flomo*, 643 F.3d at 1022.

II. CONVENTION ON THE RIGHTS OF THE CHILD ARTICLE 32: A PROPOSED SOLUTION

A. *Background on the Convention on the Rights of the Child*

The Convention on the Rights of the Child is an international agreement establishing “a comprehensive set of goals for individual nations to achieve on behalf of their children.”¹⁶ The CRC affirms children’s basic civil, political, economic, social and humanitarian rights.¹⁷ Every member of the U.N. has ratified the CRC except for the U.S. and Somalia.¹⁸ Although the U.S. signed the CRC on February 16, 1995,¹⁹ signing a treaty does not legally bind a country.²⁰

Thus, the CRC “does not have the force of domestic law and does not create binding obligations” until it has undergone the full ratification process in Congress.²¹ However, the CRC is an international custom, even though the U.S. has not ratified.²² As such, the CRC is only enforceable through the second clause of the Alien Tort Statute, which allows jurisdiction when a foreign plaintiff claims a violation of international custom.²³

¹⁶ *Convention on the Rights of the Child: Frequently Asked Questions*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0> (last visited June 24, 2012).

¹⁷ See CRC, *supra* note 11, pmbl. (recognizing that children are an integral part of society and the family unit, and, as such, require “special care and assistance”).

¹⁸ See *Status of Ratifications of the Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited June 24, 2012). Somalia is unable to ratify at this time because it does not have a recognized government. *Convention on the Rights of the Child: Frequently Asked Questions*, UNICEF, http://www.unicef.org/crc/index_30229.html (last visited June 24, 2012).

¹⁹ CRC, *supra* note 11.

²⁰ See Rutkow & Lozman, *supra* note 13, at 166 (“Although signature of a treaty is generally understood to demonstrate intent to ratify after signature, ratification is not always imminent.”).

²¹ Kurtis A. Kemper, *Construction and Application of the United Nations Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989)—*Global Cases and Administrative Decisions*, 20 A.L.R. FED. 2D 95, § 2 (2007). The U.S. Constitution provides that the President can make treaties with other countries with the “Advice and Consent of the Senate.” U.S. CONST. art II, § 2, cl. 2. Without going through this process, a treaty has no legal force.

²² *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 176–77 (2d Cir. 2009) (holding unanimity is not required for a treaty or agreement to become an international custom); see also *Flomo*, 643 F.3d at 1021–22 (noting that requiring unanimity would give every nation veto power over customary international law).

²³ The first clause allows for jurisdiction over violations of the law of nations. Since the U.S. has yet to ratify a treaty providing a cause of action for child laborers, plaintiffs are limited to U.S. courts and could not use an international tribunal. Jessica Bergman, Note, *The Alien Tort Statute and Flomo v. Firestone Natural Rubber Company: The Key to Change in Global Child Labor Practices?*, 18 Ind. J. Global Legal Stud. 455, 462 (2011).

Yet the Seventh Circuit's criticism in *Flomo* demonstrates that the ATS is unlikely to provide remedy to foreign plaintiffs seeking to enforce customary international law relating to child labor.

B. Resistance to Ratification of the Convention as a Whole

The government's failure to ratify the CRC is largely attributable to political controversy and misconception about the CRC's intent, language, and purpose.²⁴ Opponents of the CRC usually have two main arguments: (1) the CRC will interfere with parents' judicially implied constitutional right to raise children,²⁵ and (2) ratifying the CRC will weaken U.S. sovereignty and give the U.N. power to determine how American children are treated within our legal system.²⁶ Opponents take issue with the whole text of the CRC and believe that the CRC as a whole places an unwarranted level of importance on children's rights to the detriment of parental rights.²⁷ Interest groups also fear that ratification of the CRC will permit children to sue their parents and enable teenagers to get abortions without parental consent.²⁸ Scholars have largely dismissed these two main arguments because opponents fail to adequately comprehend the true text and purpose of the treaty.²⁹

Groups concerned that the CRC will compromise American sovereignty fail to realize that the U.S. cannot legally be bound to a treaty

²⁴ See, e.g., Michelle Z. Hall, *Convention on the Rights of the Child: Has America Closed Its Eyes?*, 17 N.Y.L. SCH. J. HUM. RTS. 923, 925 (2001) (explaining that political dynamics are the main cause of the U.S.'s failure to ratify the CRC).

²⁵ Rutkow & Lozman, *supra* note 13, at 179; see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding the "liberty" protected by the due process clause included the right to establish a home and bring up children); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (holding that parents can decide how to educate and raise their children without interference from the state).

²⁶ Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 20 (Jonathan Todres, et al. eds., 2006).

²⁷ See, e.g., Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third World Activism*, 38 WASHBURN L.J. 111, 122-24 (1998) ("[The CRC] will limit the ability of U.S. parents to act in the best interests of their children, as only they are deemed qualified to do.").

²⁸ See Bruce C. Hafen & Johnathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 460 (1996) (arguing the CRC grants unrestricted access to abortions and is thus incompatible with U.S. laws); but see Hall, *supra* note 24, at 926-27 (responding to arguments that the CRC authorizes abortion for minors without parental consent).

²⁹ See, e.g., Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, 26 HUM. RTS. 27, 29 (1999) (concluding that most arguments opposing the CRC are false).

without voluntary consent.³⁰ While ratifying a treaty may restrict U.S. sovereignty in a specific area, Congress has the power to determine when such a tradeoff is worthwhile.³¹ Since the U.S. views international treaties as non-self-executing, the act of ratification itself should be viewed as an exercise of sovereignty.³² In the event of a conflict between the two bodies of law, the Constitution would always supersede the CRC.³³

Furthermore, neither the U.N. nor the CRC provide how a state party should implement or enforce the treaty.³⁴ Instead, the CRC created a Committee on the Rights of the Child to evaluate how ratifying countries have implemented the CRC's provisions and provide guidance for improvement.³⁵ The Committee bases its evaluation on periodic reports submitted by each country.³⁶ CRC Article 45 also allows the Committee to use additional methods to monitor compliance – such as consulting specialized agencies, commissioning studies for additional information, and publishing general recommendations and suggestions.³⁷ However, Article 45 is not technically an enforcement mechanism because individual states have the ultimate power to choose how to implement the CRC's goals.³⁸

³⁰ The U.S. has approached most international human rights treaties as non-self-executing documents. *See generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (offering an in-depth analysis of U.S. policies towards ratification of international human rights treaties).

³¹ Rutkow & Lozman, *supra* note 13, at 181.

³² T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1995 (2004).

³³ *See* U.S. CONST. art VI, cl. 2. (stating that the U.S. Constitution is the “Supreme Law of the Land” and takes precedence over all other laws and treaties).

³⁴ Hall, *supra* note 24, at 925–26; *see also Implementation: Fulfilling Obligations Under the Convention on the Rights of the Child and its Optional Protocols*, UNICEF, http://www.unicef.org/crc/index_30208.html (last visited June 24, 2012) (“There are no specific right or wrong implementation measures, however the Convention should be the main benchmark and inspiration for all government action.”).

³⁵ CRC, *supra* note 11, art. 43. Article 43 creates the Committee on the Rights of the Child. *See generally* Cynthia Price Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER L. REV. 95 (2000) (providing a detailed description of the CRC's enforcement procedures in articles 43–45).

³⁶ CRC, *supra* note 11, art. 44. The initial report is due to the Committee on the Rights of the Child, through the U.N. Secretary-General, within two years of a state party's ratification. All subsequent reports must be submitted once every five years. States party must also make reports available to the public within their own borders. *Id.*

³⁷ *Id.* art. 45. The Committee on the Rights of the Child may also invite other specialized organizations within the U.N., such as the U.N. Children's Fund to submit reports on particular issues. *Id.*

³⁸ *See* Timothy A. Glut, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1224–25 (1995) (“Article 45 comes the closest to providing for enforcement, by requiring agencies that moni-

Furthermore, the U.S. has ratified many other human rights treaties with no adverse effects on sovereignty.³⁹

Opponents also portray the CRC as anti-family and impinging on parental rights, when in reality, the CRC espouses the opposite. The text of the CRC makes numerous references to a child's place within the family and favorably describes the family unit as a whole. For example, the Preamble refers to the family as "a fundamental group of society" and "the natural environment for growth and well-being."⁴⁰ Article 5 obliges states party to "respect the responsibilities, rights and duties of parents."⁴¹ Moreover, Article 9 requires states party to ensure that children are not separated from their parents against their will, except in cases where competent authorities deem it necessary for the child's best interest.⁴² As evidenced at various points in the text, drafters of the CRC intended to "preserve the balance" between children's rights and family rights, rather than reduce a parent's legitimate rights or undermine the family unit.⁴³ Opponents claiming that the CRC is anti-family take the treaty out of context and ignore the fact that children can, and often do, become victims of neglect and abuse.⁴⁴

tor the child labor problem to report the suggestions and recommendations for the U.N. General Assembly.").

³⁹ See *United States Ratification of International Rights Treaties*, HUM. RTS. WATCH (July 24, 2009), <http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties>.

⁴⁰ CRC, *supra* note 11, pmb1.

⁴¹ See *id.* art. 5.

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Id.

⁴² See *id.* art. 9(1).

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Id.

⁴³ SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 271 (1999).

⁴⁴ See Barbara Bennett Woodhouse, *The Family Supporting Nature of the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 39 (Jonathan

Furthermore, opponents have no legitimate basis for inferring that the CRC authorizes children to sue their parents and obtain abortions without parental consent.⁴⁵ In the U.S., children already have the right to sue their parents for certain causes of action, such as gross parental negligence.⁴⁶ Even if the CRC did permit such lawsuits it would not be creating a “new” right for children. Critics of the CRC mistakenly interpret the treaty to provide a right to receive an abortion without parental consent.⁴⁷ Article 16 grants the child a right to privacy, but is silent on the issue of abortion.⁴⁸ The CRC is purposely silent with respect to abortion and the rights of unborn children so that the treaty would appeal to a wide variety of cultural backgrounds.⁴⁹ Article 1 broadly defines a child as “every human being below the age of eighteen years,” but does not specify when childhood begins.⁵⁰ Article 1’s flexibility has enabled countries with strict abortion laws, such as Ireland and the Philippines, to ratify the CRC, as well as those countries with more liberal abortion laws.⁵¹ Given this information, ratification of the CRC would not conflict with current laws or policies in the U.S. relating to abortion.⁵²

Todres et al., 2006) (explaining that the CRC focused on children’s rights to encourage governments to protect children from systematic abuse).

⁴⁵ See Rutkow & Lozman, *supra* note 13, at 186–87 (discussing the CRC’s family-centric point of view and explaining the CRC does not take a position on abortion); *cf.* Todres, *supra* note 26, at 24 (explaining that any means for a child to sue their parents would come from existing national or state law, but not the CRC).

⁴⁶ See CYNTHIA PRICE COHEN & SUSAN H. BITENSKY, UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ANSWERS TO 30 QUESTIONS 3 (1994) (explaining that children can already sue their parents under U.S. laws, so ratification of the CRC would not present a conflict even if it did endorse such a right).

⁴⁷ See, e.g., Todres, *supra* note 26, at 25–26.

⁴⁸ CRC, *supra* note 11, art. 16 (providing that children have a right to legal protection from “arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.”).

⁴⁹ See Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156–57 (1990) (explaining that drafters of the CRC deliberately discussed the rights of the unborn, but decided to keep silent on the issue); see also Alison Dundes Renteln, *Who’s Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT’L & COMP. L. 629, 633–34 (1997) (analyzing the CRC’s text and concluding it was purposefully drafted not to take a position on abortion).

⁵⁰ CRC, *supra* note 11, art. 1. The treaty also allows for country’s laws who lower the age of majority to younger than eighteen years. *Id.*

⁵¹ See *Status of Ratification of the Convention on the Rights of the Child*, *supra* note 18 (providing a complete list of ratifications and reservations to the CRC); Hall, *supra* note 24, at 927 (describing how countries with both strict and liberal abortion laws have ratified the CRC).

⁵² See Rutkow & Lozman, *supra* note 13, at 186 (noting the CRC does not conflict with American abortion or family planning laws).

None of the opponents' arguments would impede codifying Article 32 in a domestic statute, as the majority of controversy centers around topics other than economic exploitation.⁵³ Yet, ratification of the CRC still seems distant on the horizon, due to the political rhetoric surrounding the CRC as a whole.⁵⁴ Meanwhile, children living domestically and abroad suffer from the harmful effects of parents and employers who abuse loopholes or the lack of effective national regulation. The U.S. has already implemented legislation attempting to regulate child labor.⁵⁵ In this way, adopting a federal statute mirroring Article 32 merely builds upon a concept with which Americans already agree – exploitative child labor should be eradicated.

C. *Textual Analysis of CRC Article 32*

Article 32 has two main subsections: subsection (1) affirms the child's right to be free from exploitative and harmful labor, while subsection (2) requires states to take an active role in preventing child labor. Article 32(1) of the CRC explains that states party "recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development."⁵⁶ Article 32 thus aims to protect children from working in certain occupations, while also providing protection to those children who are eligible for work.⁵⁷

Economic exploitation can generally be defined as forcing or encouraging labor at the expense of an individual's health and well-being and the development of society.⁵⁸ However, figuring out precisely which types of labor conditions constitute economic exploitation proves difficult given the language of Article 32.⁵⁹ For instance, it may not be clear that a child's

⁵³ See generally Karen A. McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP. L. REV. 467 (1993) (explaining that much of the CRC controversy centers on the abortion debate, minimum eligible age for military service, and children's indirect participation in armed conflicts).

⁵⁴ See Dundes Renteln, *supra* note 49, at 631 (explaining that the CRC has been the subject of multiple political controversies).

⁵⁵ See Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2006).

⁵⁶ CRC, *supra* note 11, art. 32(1).

⁵⁷ VAN BUREN, *supra* note 13, at 263.

⁵⁸ *Id.* at 264.

⁵⁹ See Elisabeth A. Mason, *Child Labor and the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 267 (Jonathan Todres et al. eds., 2006) (explaining that it is difficult to apply the rights described in article 32(1) to situations in reality).

health or social development is at risk while working in a specific occupation because the detrimental effects do not appear until later in life.

During the drafting process of Article 32, most of the countries involved were in agreement about recognizing a child's right to be free from economic exploitation.⁶⁰ The main issue for many participating countries concerned what types of work children have a right *not* to perform.⁶¹ This is reflected in the final text, which recognizes the child's right to protection from economic exploitation and from performing certain types of work.⁶² UNICEF has identified the following elements of economic exploitation: working too many hours, inadequate wages, work that negatively impacts the child's mental and physical development, beginning full-time work at a very early age, or work that entails an excessive amount of responsibility.⁶³ These factors can help a court determine whether the facts of a given case constitute economic exploitation under Article 32, in addition to any other factors that the court may deem relevant.

Additionally, Article 32 does not specify which types of work can harm the child's health or physical, mental, spiritual, moral, or social development. Use of the word "or" suggests that the child has a right to refuse performing any work that harms him in any way described by Article 32.⁶⁴ The CRC also does not establish how material the harm needs to be before a child refuses to work. Rather, it seems that the frequency, intensity, and general nature of the work are all factors to evaluate the extent to which a given task impacts a child.⁶⁵

The second clause of Article 32 provides several guidelines for states party to reference when implementing Article 32(1). These guidelines focus on legislative remedies, encouraging states party to:

- (a) Provide for a minimum age or minimum ages for admission to employment;

⁶⁰ See OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 693–708 (2007) (summarizing different nation's comments on drafts of the CRC).

⁶¹ *Id.* The main linguistic changes center around the exact wording of what children should be protected from. The first draft of Article 32 acknowledged the child's right to protection from "all forms of neglect, cruelty, and exploitation." *Id.* at 693. The first revised version changed this language to "all forms of discrimination, social exploitation, and degradation of his dignity." *Id.* at 697. Additional discussion finally led to the Working Group's adoption of the words "economic exploitation," as it currently reads in Article 32. *Id.* at 703.

⁶² VAN BUREN, *supra* note 13, at 264.

⁶³ *Id.*

⁶⁴ Mason, *supra* note 59, at 268.

⁶⁵ See *id.* (explaining that several factors contribute to the child's right to be protected from harmful work).

- (b) Provide for appropriate regulation of the hours and conditions of employment; [and]
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.⁶⁶

Article 32 also recommends that states implement social and education measures to ensure compliance.⁶⁷ By giving a list of legislative provisions and suggestions for social programming, the second clause creates scaffolding for states party to ensure that they meet the minimum standards for compliance with Article 32(1).⁶⁸ However, these guidelines are still broad enough to ensure that states party have the ultimate power in choosing how to implement Article 32's provisions.⁶⁹

III. CURRENT CHILD LABOR LAWS DO NOT PROVIDE ADEQUATE PROTECTION

Sadly, the Liberian children's suffering in *Flomo* is not unique. The International Labour Organization estimates that approximately 215 million children in the world are engaged in child labor.⁷⁰ Approximately 70% of these children work in agriculture, while the remaining children work in service businesses and industry.⁷¹ The majority of child laborers are in Asia, Africa, and Latin America,⁷² but this is not just a developing world problem. These statistics likely underestimate the number of working children, as poorer nations do not maintain this type of data.⁷³ Further, knowing the general distaste for such labor, reporting is likely significantly lower than the actual rates.

⁶⁶ CRC, *supra* note 11, art. 32(2).

⁶⁷ *Id.*

⁶⁸ *See id.* ("States Parties shall in particular . . .").

⁶⁹ Price Cohen, *supra* note 35, at 95–96 (explaining that state parties must submit reports to the Committee on the Rights of the Child and detailing precisely how they have chosen to implement Article 32's provisions).

⁷⁰ *Child Labour*, INT'L LABOUR ORG., <http://www.ilo.org/global/topics/child-labour/lang-en/index.htm> (last visited June 24, 2012).

⁷¹ Megha Bahree, *Child Labor*, FORBES.COM (Mar. 10, 2008), <http://www.forbes.com/global/2008/0310/062.html>.

⁷² *See Percentage of Children Aged 5–14 Engaged in Child Labor*, UNICEF, http://www.childinfo.org/labour_countrydata.php?q=printme (last visited June 24, 2012) (giving a detailed chart of the total percentage of children aged and 5–14 engaged in child labor in each country).

⁷³ *See* David L. Parker, *Child Labor: The Impact of Economic Exploitation on the Health and Welfare of Children*, 21 WHITTIER L. REV. 177, 181 (1999) (explaining that maintaining accurate data on child labor is difficult in both developed and undeveloped nations).

A. *The Problem of Exploitative Child Labor: A Self-Fulfilling Prophecy*

The negative effects of exploitative child labor extend into nearly every aspect of the child's life and can have far-reaching social consequences.⁷⁴ Poverty is both a cause and consequence of exploitative child labor.⁷⁵ For example, studies have found a strong correlation between child labor and malnutrition, illiteracy, and lack of maternal education.⁷⁶ Child laborers also face a myriad of health concerns resulting from the specific types of labor that they often perform, including irreversible neurological damage from exposure to toxic substances, such as lead.⁷⁷ Repeated exposure to mercury and carbon monoxide also pose significant reproductive hazards and can impede a child's growth and development.⁷⁸ Another study revealed that children who are abused physically or sexually in the workplace are extremely likely to suffer from a psychiatric mental condition by the time they reach twenty-one years.⁷⁹ Child laborers are also substantially more likely to engage in substance abuse, experience low self-esteem, and participate in anti-social behavior.⁸⁰

⁷⁴ See, e.g., Glut, *supra* note 38, at 1208 (explaining that child labor reduces society's level of education and creates a cycle of poverty, in addition to jeopardizing children's health and future earnings).

⁷⁵ The World Health Organization has a particularly helpful chart demonstrating the interplay between poverty and child labor. *Children's Environmental Health: Hazardous Child Labor*, WORLD HEALTH ORGANIZATION, <http://www.who.int/ceh/risks/labour/en/index.html> (last visited June 24, 2012); see also Glut, *supra* note 38, at 1207–08 (arguing that child labor contributes to poverty by preventing children from obtaining an education and advancing to higher paying jobs).

⁷⁶ M. Aminul Islam et al., *Maternal and Socioeconomic Factors and the Risk of Severe Malnutrition in a Child: A Case-Control Study*, 48 EUR. J. CLINICAL NUTRITION 416, 418–19 (1994).

⁷⁷ Parker, *supra* note 73, at 184. Dr. Parker also points out that, “[A] child who begins work at an early age has many more years to develop a problem compared to adults with similar exposure.” *Id.* at 185. Children's bodies also appear to be more sensitive to toxic substances, as their bodies are not completely developed and therefore more susceptible to damage. *Id.*

⁷⁸ *Id.* at 184.

⁷⁹ *Long Term Consequences of Child Abuse and Neglect*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm (last visited June 24, 2012). Child Information Welfare Gateway cites a study that found 80% of young adults who had been abused or neglected as children met the criteria for at least one psychiatric disorder. Abused children commonly suffer from disorders such as depression, anxiety, dissociative disorders, post-traumatic stress disorder, and reactive attachment disorder. *Id.*

⁸⁰ See Atalay Alem et al., *Child Labor and Childhood Behavioral and Mental Health Problems in Ethiopia*, 20 ETHIOP. J. HEALTH DEV. 119, 123 (2006) (providing a chart comparing statistics on the frequency of specific symptoms of mental health disorders in child laborers with non-laboring children).

Not surprisingly, employers in developing countries typically do not fear repercussions for exploiting children; as such exploitation increases profits without the risk of significant sanctions.⁸¹ American companies that import and purchase products made by children further reinforce the benefits of exploitative child labor.⁸² As a result, many developing countries are unable to enforce their own child labor laws.⁸³ Thus, developed countries, like the U.S., ought to step in and provide a real incentive for companies to comply.⁸⁴

B. U.S. Child Labor Law: Loopholes and Opportunities for Exploitation

Exploitative child labor is not exclusive to developing countries; it is rampant throughout the developed world as well.⁸⁵ Although domestic child labor regulations appear to have eradicated all forms of exploitative child labor, this perception is largely inaccurate.⁸⁶ Children in the U.S. are subjected to working conditions that compromise their safety, expose them to numerous health risks, and interfere with schoolwork.⁸⁷ In order to

⁸¹ See Glut, *supra* note 38, at 1209 (“A child work force, accordingly, means greater profits for employers.”).

⁸² Matthew C. Bazzano, *Child Labor: What the United States and its Corporations Can Do To Eliminate its Use*, 18 HAMLINE J. PUB. L. & POL’Y 200, 200 (1996).

⁸³ Bergman, *supra* note 23, at 456.

⁸⁴ See Glut, *supra* note 38, at 1224 (“Employers are unlikely to relinquish access to such cheap, exploitable labor unless someone threatens them with effective penalties.”); Donald C. Dowling, Jr., *The Multinational’s Manifesto on Sweatshops, Trade/Labor Linkage, and Codes of Conduct*, 8 TULSA J. COMP & INT’L L. 27, 33–34 (2000) (proposing developing countries are more protective than developed countries on paper, but such laws are still very difficult to enforce); *India: Child Labor Law Welcomed, But Needs Enforcing*, HUM. RTS. WATCH (Oct. 6, 2006), <http://www.hrw.org/news/2006/10/04/india-child-labor-law-welcomed-needs-enforcing> (describing how India passed a law banning all forms of labor for children under 14 years, but enforcement is still incredibly problematic). The article also discusses a study, which took place between 1996 and 2003, that found most government officials who were responsible for enforcing child labor laws had failed to do so. The study also found that illegal employers of children were almost never sanctioned. *Id.*

⁸⁵ See Erik Eckholm, *U.S. Cracks Down on Farmers Who Hire Children*, N.Y. TIMES, June 19, 2010, at A1 (describing stories from migrant farmers and their families about children working illegally in the blueberry fields of North Carolina); Bazzano, *supra* note 82, at 200. (“In the United States, while fewer children work than in the regions of Africa, Latin America and Asia, child labor still exists.”).

⁸⁶ See Davin C. Curtiss, Note, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. CORP. L. 303, 307–308 (1995) (addressing the myths of child labor in agriculture).

⁸⁷ See Celeste Corlett, Note, *Impact of the 2000 Child Labor Treaty on the United States Laborers*, 19 ARIZ. J. INT’L & COMP. L. 713, 719–23 (demonstrating that children working in agriculture are subject to many health and safety risks due to the inherently dangerous nature of farming occupations).

demonstrate how employers exploit loopholes in U.S. child labor law, it is first necessary to understand its historical development.

Before the early 1900s, the U.S. lacked any restrictions on the maximum number of hours or types of occupations that children could perform.⁸⁸ During the Industrial Revolution, children typically worked fourteen-hour days using extremely dangerous machinery that often resulted in traumatic injuries and death.⁸⁹ In 1916, Congress responded to concerns about injuries to child laborers by adopting legislation that prohibited interstate commerce of goods made with child labor.⁹⁰

However, in *Hammer v. Dagenhart*, the Supreme Court held this legislation was an unconstitutional use of Congress's commerce power, as employment law was a "local" matter, rather than a "federal" matter.⁹¹ The majority reasoned that Congress had overstepped its constitutional boundaries because it tried to standardize state employment laws instead of regulating an intrinsically harmful product.⁹² Twenty-three years later, the Supreme Court declined to follow *Hammer* in *United States v. Darby* and presented a broader interpretation of the commerce clause.⁹³ *Darby* led to current child labor law, which is largely embodied in the Fair Labor Standards Act of 1938.⁹⁴

1. The Fair Labor Standards Act and its Treatment of Child Labor

Section 212(c) of the Fair Labor Standards Act (FLSA) prohibits employers from using "oppressive" child labor in interstate commerce or "in production of goods for commerce or in any enterprise engaged in

⁸⁸ STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE AREA 5–6 (1968).

⁸⁹ See KEVIN HILLSTROM & LAURIE COLLIER HILSTROM, INDUSTRIAL REVOLUTION IN AMERICA: MINING AND PETROLEUM 205 (2006) (describing how children often were killed or maimed in factory accidents during the Industrial Revolution).

⁹⁰ See generally HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 65–70 (2002) (describing the passage of the Keating-Owen Act of 1916).

⁹¹ *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

⁹² *Id.* at 272–73. Prior to *Dagenhart*, there had been a series of cases affirming Congress's power to regulate products that were intrinsically harmful. *Champion v. Ames*, 188 U.S. 321 (1903) (upholding a law prohibiting interstate transportation of lottery tickets); *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding Congress's power to enact the Pure Food and Drugs Act, which proscribed interstate transportation and delivery of impure food and drugs); *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the constitutionality of a law which prohibited transporting women across state lines for the purpose of prostitution). The Court drew a distinction between prior cases and *Dagenhart* because the products made by child laborers were not intrinsically immoral or harmful.

⁹³ *United States v. Darby*, 312 U.S. 100, 116 (1941).

⁹⁴ *Darby* established the constitutionality of the FLSA. *Darby*, 312 U.S. at 125–26; see also HINDMAN, *supra* note 90, at 85.

commerce or in the production of goods for commerce.”⁹⁵ FLSA sets a general standard of sixteen years as the minimum age for admission to employment.⁹⁶ While courts often construe the scope of interstate commerce widely,⁹⁷ FLSA’s definition of “oppressive child labor” is riddled with exceptions.⁹⁸ These exceptions swallow a significant portion of FLSA’s general rule and leave many children unprotected.⁹⁹

First, FLSA exempts family employment.¹⁰⁰ Parents employing children in their family do not have to comply with restrictions on the number of hours a child can work in a week.¹⁰¹ The only restriction FLSA places on parental employment is that the child may not engage in mining, manufacturing, or an occupation found by the Secretary of Labor to be “particularly hazardous.”¹⁰² The employee child does not even have to be a biological child, as the statute permits parents or guardians to employ “children in [their] custody.”¹⁰³ Parents who abuse this exemption can legally employ children within their custody in ways that interfere with the child’s health, education, or well-being.¹⁰⁴ Abuse of this exception primarily occurs within agricultural employment.¹⁰⁵

Second, FLSA grants the Secretary of Labor substantial discretion in making exemptions.¹⁰⁶ The Secretary of Labor may exempt fourteen- and fifteen-year-olds in certain occupations to the extent the employment does not interfere with the child’s schooling, health, or well-being.¹⁰⁷ To enforce

⁹⁵ 29 U.S.C. § 212(c) (2006).

⁹⁶ 29 U.S.C. § 203(l) states that “any employee under the age of sixteen years [that] is employed by an employer . . . in any occupation” will constitute oppressive child labor.

⁹⁷ See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (outlining three types of activities that Congress can regulate under the commerce clause—(1) channels of commerce; (2) instrumentalities, persons or things in interstate commerce; and (3) activities that substantially affect or relate to interstate commerce).

⁹⁸ 29 U.S.C. § 203(l); Mason, *supra* note 59, at 270.

⁹⁹ HINDMAN, *supra* note 90, at 85.

¹⁰⁰ 29 U.S.C. § 203(l).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ This is not to say that all, or even the majority, of parents who employ their children exploit them. Rather this exemption takes away the law’s ability to punish parents who do abuse it. The fact that the law cannot adequately respond to such a situation is unfortunate to say the least.

¹⁰⁵ The exception for family employment is often abused in conjunction with agricultural employment, specifically when parents employ their own children as independent contractors. Curtiss, *supra* note 86, at 321–323.

¹⁰⁶ 29 U.S.C. § 203(l).

¹⁰⁷ *Id.* Occupations in mining and manufacturing can never be exempt from the definition of “oppressive child labor.” Otherwise, the Secretary of Labor has significant flexibility to

FLSA's provisions, the Secretary of Labor may require employers to provide proof of age for any employee.¹⁰⁸ Employers found in violation of these provisions can be fined between \$1,000 and \$10,000 per child.¹⁰⁹ While these monetary penalties have been assessed to affect employer's future compliance with FLSA,¹¹⁰ such a punishment is contingent on the employer actually being caught in the first place.

2. Special Exceptions for Children Working in Agriculture

Section 213(c), which applies to children in agricultural occupations, further weakens FLSA's standards.¹¹¹ When Congress drafted these provisions, most people assumed that children working on farms engaged in family chores and learned valuable skills.¹¹² However, this assumption does not hold true today. In fact, the law actually legalizes abusive labor practices against children working in agriculture.¹¹³

For example, children as young as twelve may work in agricultural occupations within their school district if a parent or guardian consents, or if a parent or guardian is also employed on that farm.¹¹⁴ Children aged fourteen or older may be employed without such parental consent.¹¹⁵ Additionally, the Secretary of Labor may declare that a specific agricultural activity is too hazardous for any child under sixteen years old.¹¹⁶ However, the Secretary's declarations do not apply to family agricultural businesses.¹¹⁷

exempt certain occupations. The Secretary of Labor may issue orders or regulations to exempt an occupation from the FLSA. *Id.*

¹⁰⁸ 29 U.S.C. § 212(d).

¹⁰⁹ 29 U.S.C. § 216 (e)(1)(A). The U.S. Department of Labor's Wage and Hour Division is responsible for enforcing the FLSA's child labor provisions. See *generally Youth & Labor*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/youthlabor/index.htm> (last visited June 24, 2012). The actual amount of fines that an employer must pay depends on several factors, including the employer's mental state, past violations, intervals between violations, and commitment to future compliance. 29 C.F.R. § 578.4 (2012). A willful violation of the FLSA occurs when the employer *knows* that his conduct is prohibited by the FLSA, whereas a violation committed in reckless disregard happens when the employer *should have known* that his conduct was prohibited but failed to make the appropriate inquiries. 29 C.F.R. § 578.3 (2012).

¹¹⁰ BUREAU OF LABOR STAT., THE REPORT ON THE YOUTH LABOR FORCE 11 (2000), *available at* <http://www.bls.gov/opub/rylf/pdf/chapter2.pdf>

¹¹¹ Mason, *supra* note 59, at 271.

¹¹² Curtiss, *supra* note 86, at 308.

¹¹³ See *id.* at 319–20 (“Simply put, such a depiction of child labor does not comport with the health risks that farming poses for young workers.”).

¹¹⁴ 29 U.S.C. § 213(c)(1)(B) (2006).

¹¹⁵ *Id.* § 213(c)(1)(C).

¹¹⁶ *Id.* § 213(c)(1)(C).

¹¹⁷ *Id.* § 213(c)(2).

Due to these exemptions, the FLSA offers little protection to children employed on farms by their families and opens the door for parental abuse. Scholars recognize agriculture as a particularly dangerous occupation for any worker.¹¹⁸ Incidentally, agriculture is also the area that offers the least protection of children.¹¹⁹ While the law assumes that parents and guardians will act in the best interest of their children,¹²⁰ sadly, *Flomo* tells us otherwise.

Three loopholes within FLSA make it possible for farmers to exploit child laborers.¹²¹ First, the only major prohibition in § 213(c) is that work activities may not take place during school hours.¹²² This means that children can legally work more than 100 hours per week, as long as those 100 hours do not conflict with school hours.¹²³ Second, FLSA fails to adequately protect child laborers from participating in activities that might be hazardous or detrimental to their health or well-being while working on a family farm.¹²⁴ Third, FLSA exempts children employed by their parents from being paid above the minimum wage or receiving overtime payments.¹²⁵ These exceptions create major educational and financial obstacles for child workers in agriculture. Depending on how quickly they work, children can sometimes receive as little as \$5.00 per hour.¹²⁶ It is common for these children to miss school to work on the fields, or even drop out of school entirely.¹²⁷

¹¹⁸ Corlett, *supra* note 87, at 713; *see also* Eckholm, *supra* note 85 (“[U.S. law] permits children 12 and up to work without limits outside of school hours, exposing them, critics say, to pesticides that may pose a special threat to growing bodies and robbing too many of childhood itself.”).

¹¹⁹ *See* Eckholm, *supra* note 85 (“A federal law adopted in 1938 exempts agriculture from child-labor rules that apply to other industries.”)

¹²⁰ Curtiss, *supra* note 86, at 321; *see Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (“Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

¹²¹ Curtiss, *supra* note 86, at 321.

¹²² 29 U.S.C. § 213(1).

¹²³ *See* Corlett, *supra* note 87, at 724 (explaining that the FLSA offers no cap on the maximum hours children in agriculture can work during a day or a week.).

¹²⁴ *Id.* at 720.

¹²⁵ 29 U.S.C. § 213 (a)(6).

¹²⁶ *See* ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, CHILDREN AT WORK: A GLIMPSE INTO THE LIVES OF CHILD FARMWORKERS IN THE UNITED STATES, at i (2009), *available at* <http://afop.org/wp-content/uploads/2010/07/NC-Blueberry-Photo-Booklet-2009.pdf> (noting children on blueberry farms earn \$2.50 per bucket and it takes approximately 30 minutes to fill a bucket).

¹²⁷ *See These Children Are Dropping Out of School at an Alarming Rate*, ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, http://afop.org/children-in-the-fields/learn-the-facts/#Children_are_dropping (last visited June 24, 2012) (explaining that half of all children

Loopholes in the FLSA's coverage also result in easily preventable accidents and deaths.¹²⁸ Children who work on farms beginning at an early age can only expect to live to forty-nine years of age,¹²⁹ which is almost thirty years shorter than the American average of seventy-eight years.¹³⁰ A variety of health and safety risks drastically reduce these children's life expectancy. Agricultural child laborers often work twelve-hour days filled with hard physical labor and no overtime pay for their extra efforts.¹³¹ Children working in agriculture regularly risk heat stroke, exposure to harmful chemicals, and becoming injured or permanently disabled.¹³² For example, children can become permanently disabled from carrying oversized loads of crops or using machinery, which they cannot safely operate due to their age and development.¹³³ Moreover, children are at a developmental disadvantage compared to adult workers, which makes them more likely to suffer an accident due to inattention, fatigue, or poor judgment.¹³⁴

Abuse of these loopholes occurs within two different contexts: (1) migrant farm families; and (2) traditional farm families.¹³⁵ Individuals who qualify as migrant workers can employ their own children as independent contractors and force them to work in dangerous conditions.¹³⁶ In recent

who regularly work in agriculture drop out of school). The U.S. Department of Labor acknowledges that migrant families will often employ their children to help harvest crops during certain seasons. However, the exact statistics for how regularly these children attend school during non-harvesting season are vague at best, as domestic agricultural child labor is largely "invisible—uncounted, often undocumented, and little understood." See *Child Labor in Commercial Agriculture*, U.S. DEP'T OF LABOR, BUREAU OF INT'L AFF., <http://www.dol.gov/ilab/media/reports/iclp/sweat2/commercial.htm> (last visited June 24, 2012).

¹²⁸ Curtiss, *supra* note 86, at 323. For example, in July 2011, two fourteen-year old girls were electrocuted by a field irrigator while working on a corn field in Illinois. See *OSHA Investigating Farm Accident that Killed Two Teen Girls*, CHI. TRIB. (July 26, 2011), http://smfws.com/articles2011/articles_july_2011/art07262011.html.

¹²⁹ *History*, UNITED FARM WORKERS, http://www.ufw.org/_page.php?menu=research&inc=history/12.html (last visited June 24, 2012).

¹³⁰ Data from 2011 indicates the average life expectancy in the U.S. is 78.37 years. *The World Factbook: Life Expectancy at Birth*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html> (last visited June 24, 2012).

¹³¹ Corlett, *supra* note 87, at 724.

¹³² 29 U.S.C. § 202 (a)–(b) (2006).

¹³³ *Child Labor in Commercial Agriculture*, *supra* note 127.

¹³⁴ See A. BEQUELE & W.E. MYERS, *FIRST THINGS FIRST IN CHILD LABOUR: ELIMINATING WORK DETRIMENTAL TO CHILDREN* 9 (1995) (explaining reasons why children are at an increased risk for occupational injuries).

¹³⁵ Curtiss, *supra* note 86, at 321–23.

¹³⁶ See Marc Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. DAVIS L. REV. 733, 754 (1990) ("If farmers succeed in classifying as self-employed parents who employ their own children as laborers, they can evade the ban on employing 'oppressive child labor,' because parents can employ their own children under the age of sixteen.").

years, blueberry farmers have been slapped with fines and bad publicity for allowing adult employees of the farm to employ their own children in picking blueberries.¹³⁷ Parents often employ their children as laborers to help financially support the family.¹³⁸ These children are often deprived of educational stability because migrant families move to different areas of the country according to the various harvesting seasons.¹³⁹ One study reports that migrant children will attend as many as ten different school districts in one year.¹⁴⁰

In traditional farming families, the abuse tends to center on the dangerous tasks that parents allow their child employees to perform.¹⁴¹ For example, a ten-year-old boy had his arm ripped off by a feeder wagon after a string from his snow suit got caught in the machinery.¹⁴² It is difficult to determine exactly how widespread the problem is and how many children are injured on family farms for various reasons: a lack of media attention, tolerance within the farm community for accidents, and underreporting.¹⁴³

In sum, the evils of exploitative child labor have well-documented consequences, creating a cycle of poverty, illness, and illiteracy. As the global marketplace grows, so will the domestic and international demand for cheap labor—particularly child labor.¹⁴⁴ The U.S. is in a position to influence the usage of exploitative child labor due to its major role in the global economy and its power to amend current domestic law.¹⁴⁵ Accordingly, the U.S. should provide the protection that children both require and deserve by enacting legislation that implements the functionalities of Article 32.

¹³⁷ Eckholm, *supra* note 85.

¹³⁸ *Id.*

¹³⁹ HUM. RTS. WATCH, FIELDS OF PERIL: CHILD LABOR IN U.S. AGRICULTURE 33 (2010), available at http://www.hrw.org/sites/default/files/reports/crd0510webwcover_1.pdf.

¹⁴⁰ *Id.* at 34.

¹⁴¹ See Curtiss, *supra* note 86, at 321–23 (focusing on children harmed or killed in farm accidents in traditional farming families).

¹⁴² In the Matter of Admin'r, Wage and Hour Div., U.S. Dep't of Labor v. Elderkin, 2000 WL 960261, at *6 (DOL Admn. Rev. Bd. 2000).

¹⁴³ See Curtiss, *supra* note 86, 322–23 (explaining several reasons why safety regulations in agricultural occupations have not been improved).

¹⁴⁴ See Bergman, *supra* note 23, at 455–56 (“With trade becoming more liberalized, corporations are racing to produce goods quicker and cheaper than their competitors, which has exacerbated human rights problems for workers in developing countries.”).

¹⁴⁵ See *id.* (“The United States, as a global power, is currently in a position to recognize internationally recognized standards of conduct relating to labor.”).

IV. TO WHAT EXTENT DOES U.S. LAW COMPLY WITH ARTICLE 32?

Most federal child labor laws already comply with the requirements in Article 32(2)(a) –(c).¹⁴⁶ The FLSA includes provisions for a minimum age for employment,¹⁴⁷ maximum hours for employment,¹⁴⁸ working conditions,¹⁴⁹ and non-compliance penalties.¹⁵⁰ However, a few key areas lack full compliance.¹⁵¹ Analyzing the similarities and differences between the FLSA and Article 32 clarifies the additional steps necessary in federal law.

Courts have interpreted the Secretary of Labor's regulations to provide additional protection beyond their express language. For example, in *Hodgson v. Cactus Craft of Arizona*, the Ninth Circuit issued an injunction against a manufacturer of novelty and souvenir gift items for permitting a minor to operate a power drill.¹⁵² The court clarified a regulation by the Secretary of Labor prohibiting minors from operating “all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming (or) surfacing . . . wood.”¹⁵³ The court reasoned that although power drills were not specifically mentioned in the Secretary of Labor's regulation, employees used the drill to shape wood into pieces for lamps, thus violating the regulation.¹⁵⁴

The District Court for the District of Columbia went through a similar analysis in expanding a regulation by the Secretary of Labor prohibiting children under eighteen from operating bakery machines in *Winchell's Donut House v. U.S. Department of Labor*.¹⁵⁵ The Secretary of Labor, upon investigating the defendant employer's doughnut shop, found it

¹⁴⁶ Mason, *supra* note 59, at 269.

¹⁴⁷ 29 U.S.C. § 212(c) (2006).

¹⁴⁸ *Id.* § 207.

¹⁴⁹ *Id.* § 203(l).

¹⁵⁰ *Id.* § 216(e). The CRC was likely modeled after developed nations, like the U.S., which have had these types of regulations in place. Poland, who wrote the first draft of Article 32 in 1978, included a provision about the minimum age and protection against exploitation. Subsequent drafts attempted to nail down a specific age limit (e.g., fifteen years), provide for penalties, and time limitations. See OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 60, at 693–708 (providing previous drafts and criticism of Article 32).

¹⁵¹ Mason, *supra* note 59, at 269.

¹⁵² *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973).

¹⁵³ *Id.* (quoting 29 C.F.R. § 1500.55 (1973)). The Secretary of Labor's regulation has since been amended and can be found in the Code of Federal Regulations. 29 C.F.R. § 570.55 (2010). Interestingly, the amended title of the regulation specifically mentions “power driven wood-working machines.” *Id.*

¹⁵⁴ *Cactus Craft*, *supra* note 152, at 467. The court also based its finding on the fact that the defendant employer admitted that they boy worked at the plant and used some of the power drills. *Id.*

¹⁵⁵ *Winchell's Donut House v. U.S. Dep't. of Labor*, 526 F. Supp. 608, 610 (D.D.C. 1980); 29 C.F.R. § 570.62 (2011).

“particularly hazardous” for any employee under age eighteen to clean or operate the employer’s vertical dough mixer.¹⁵⁶ The employer argued that the regulation regarding the operation of baking machines was not applicable to retail establishments because such enterprises were not explicitly covered by the regulation.¹⁵⁷ However, the court held that the regulation did not have to be amended to specifically include retail establishments, as it was created on an occupational basis rather than an industry basis.¹⁵⁸

These types of judicial interpretations of “hazardous” labor assist the U.S. in realizing the types of children’s rights described in Article 32(1). While Article 32(1) does not establish which occupations qualify as “hazardous,” operating saws and power drills qualify as such due to the high risk of injury. The courts’ interpretations of the Secretary of Labor’s declarations are therefore a critical aspect of compliance with CRC Article 32.

A. *Comparing Article 32 and Judicial Interpretation of “Oppressive Child Labor”*

Few federal courts have offered judicial interpretation of the FLSA’s definition of “oppressive child labor” in § 203(l).¹⁵⁹ But, those courts that have offered such analysis have strictly interpreted the statute to comply with Article 32’s provisions.¹⁶⁰ For instance, in *Hodgson v. Ledet’s Foodliner of Larose, Inc.*, a supermarket employed fourteen- to sixteen-year-old boys as grocery baggers for more than 18 hours per week when school was in session.¹⁶¹ The Eastern District of Louisiana found that the employer used “oppressive child labor” in violation of the FLSA, as well as several other labor violations.¹⁶² The court awarded the plaintiff \$6,570.91 to distribute evenly among the underage employees.¹⁶³

¹⁵⁶ Winchell’s Donut House, 526 F.Supp. at 610.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* The court ultimately dismissed the suit on other due process grounds, which the appellate court later affirmed. *See* Winchell’s Donut House v. U.S. Dep’t. of Labor, 672 F.2d 898 (1981).

¹⁵⁹ Courts would evaluate the definition of “oppressive child labor” in FLSA § 203(l) as it applies to § 212, which prohibits the use of oppressive child labor in interstate commerce. 29 U.S.C. §§203(l), 212 (2006).

¹⁶⁰ Mason, *supra* note 59, at 272.

¹⁶¹ *Hodgson v. Ledet’s Foodliner of Larose, Inc.*, No. 70-3226, 1974 WL 1077, at *1 (E.D. La. Jan. 18, 1974).

¹⁶² *Id.* at *2. The court also found the defendant employer liable for failure to pay minimum wage, failure to pay overtime wages, and failure to make and preserve records in accordance with 29 C.F.R. § 531.58 (2011). *Id.*

¹⁶³ *Id.*

In *Lenroot v. Interstate Bakeries Corporation*, a bakery employed fourteen underage children aged fourteen to sixteen years.¹⁶⁴ An agent for the Children's Bureau discovered the children working when he inspected the bakery and subsequently brought suit for an injunction.¹⁶⁵ The defendant employer did not contest the use of illegal child labor.¹⁶⁶ Rather, the employer argued that an injunction was not necessary because the corporation had ceased employing underage children long before the Children's Bureau initiated the lawsuit.¹⁶⁷ The Eighth Circuit held the bakery liable for violating FLSA and remanded the case to the district court to grant an injunction.¹⁶⁸ The Eighth Circuit also criticized the district court for dismissing the case, writing that the dismissal "was tantamount to judicial expression of acquiescence in and toleration of the unlawful conduct, and no such discretion is vested in the court."¹⁶⁹

In *Durkin v. Caroline Packing Corporation*, an employer who manufactured and sold canned tomatoes in interstate commerce employed minors as young as twelve to help with the canning process.¹⁷⁰ The District Court of Virginia held the employer liable for using "oppressive child labor" because the children missed at least one day of school in order to work.¹⁷¹ By strictly enforcing FLSA's provisions on minimum age, hours, and penalties, American courts effectively ensure compliance with Article 32(2)'s requirement that state parties take "legislative and administrative" measures.

Furthermore, courts seem dedicated to allowing children access to school if they do secure employment. The District Court of Oklahoma has opined such, writing that the FLSA aims to ensure children the opportunity to attend school.¹⁷² This rationale is largely compatible with Article 32(1),

¹⁶⁴ *Lenroot v. Interstate Bakeries Corp.*, 146 F.2d 325, 326 (8th Cir. 1945).

¹⁶⁵ *Id.* at 327.

¹⁶⁶ *Id.* at 326.

¹⁶⁷ *See id.* at 326–27 ("[The corporation] contends that no injunction should be issued in the suit because 'the violations, if any, do not exist at the present time, had not existed since long before the trial of this case (which was had in January, 1944) and no future violations are impending or threatened.'").

¹⁶⁸ *Id.* at 329.

¹⁶⁹ *Id.* at 329.

¹⁷⁰ Allan L. Schwartz, *Validity, Construction, Application, and Effect of Child Labor Provisions of Fair Labor Standards Act* (29 U.S.C.A. § 212 and Related Sections), 21 A.L.R. FED. 391, § 217 (1974).

¹⁷¹ *Id.*

¹⁷² *See Shultz v. Brannon*, 1970 WL 5544, at *1 (E.D. Okla. 1970) (holding that the FLSA's purpose is to ensure children have the opportunity to attend school); *cf.* Schwartz, *supra* note 170, § 271 (discussing a California case, which stated the FLSA's purpose is to abolish child labor).

which recognizes children may refuse to perform exploitative work or work that will likely interfere with their education.¹⁷³

B. Comparing Article 32 and Judicial Interpretation of "Hazardous" Child Labor

Courts have also strictly applied the FLSA's prohibition on underage children engaging in "hazardous" labor, which substantially complies with Article 32. In *Cactus Crafts*, the court held that operating a power drill fell within the "hazardous operation criteria" set forth by the Secretary of Labor as a form of prohibited child labor.¹⁷⁴ Also, in *Mitchell v. Del-Cook Lumber Company*, a lumber company hired a minor approximately one year and three months before his eighteenth birthday to stack lumber, which had been at a sawmill.¹⁷⁵ The District Court of Georgia held that the employer violated the Secretary of Labor's regulations about hazardous occupations.¹⁷⁶ Both the Ninth Circuit and the District Court of Georgia reached a result that comports with Article 32(1)'s description of labor that is likely to interfere with the child's health or physical development. Saws and power drills require a high degree of skill to operate, which minors likely do not have.

C. Other Laws Demonstrating Compliance with Article 32

The U.S. ratification of the International Labour Organization's Convention on the Worst Forms of Child Labor also demonstrates the U.S. compliance with Article 32.¹⁷⁷ The Convention addresses the need to eliminate the most objectionable forms of child labor, such as compulsory labor, child trafficking, prostitution, and using children in producing or trafficking

¹⁷³ One can argue that exploitative labor can include preventing a child from attending school, because in many developing countries a child worker's access to education contributes significantly to ending the cycle of poverty.

¹⁷⁴ See *Cactus Craft*, *supra* note 152, at 467 ("We agree with the district court's determination that operation of a power drill fits within the hazardous operation criteria set by the Secretary as a form of prohibited child labor."). Having a statute that categorizes an activity as hazardous is very helpful for courts in interpreting the FLSA.

¹⁷⁵ Schwartz, *supra* note 170, § 8(b).

¹⁷⁶ *Id.*

¹⁷⁷ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 11; Mason, *supra* note 59, at 274. The U.S. ratified this Convention on December 2, 1999. *Ratifications for United States*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:3906739642112821::NO:11200:P11200_COUNTRY_ID:102871 (last visited June 24, 2012). The U.S. ratified this convention subject to the requirement that it would not require a change in domestic law. Press Release, President Clinton Ratifies the New ILO Convention on the Worst Forms of Child Labor: Promoting Core Labor Standards Around the World (Dec. 2, 1999), available at <http://clinton3.nara.gov/WH/New/WT0-Conf-1999/factsheets/fs-013.html>.

drugs.¹⁷⁸ Ratification of this convention may eventually result in Congress reevaluating child labor laws, as states party should periodically examine the types of activities that may qualify as an objectionable form of child labor.¹⁷⁹ Moreover, the sheer number of countries who have ratified this Convention demonstrates an international consensus that countries ought to take a tougher stance on child labor.¹⁸⁰ Reevaluating the FLSA would likely prompt Congress to close some of the loopholes in § 213 for children in agricultural jobs and bring the U.S. closer to full compliance with Article 32.

D. *Areas for Improvement*

FLSA § 212, which prohibits employers from using “oppressive child labor” in interstate commerce, appears to be in compliance with Article 32’s provisions. However, the agricultural exceptions listed in § 213(c) are inconsistent with Article 32. These loopholes in § 213(c) prevent courts from providing remedies that would otherwise be available with legislation mirroring Article 32.

The Middle District of Georgia faced this issue in *Mitchell v. Hornbuckle*, when the Secretary of Labor sued a tomato farmer who employed children during school hours to help harvest and pack ripened tomatoes.¹⁸¹ During the peak of harvesting season, the children regularly worked until midnight, and sometimes until two or three o’clock in the morning, which negatively impacted their performance in school.¹⁸² The court explained that the law provided no protection against employing children at night.¹⁸³ For this reason the court added that, “this practice of night employment makes it all the more important that the law be strictly observed as far as it goes.”¹⁸⁴

¹⁷⁸ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 11, art. 3(d).

¹⁷⁹ *Id.* art. 4(2); Mason, *supra* note 59, at 274.

¹⁸⁰ 175 out of 183 members of the ILO have ratified the Convention on the Worst Forms of Child Labor as of June, 2012. The remaining countries yet to ratify are Cuba, Eritrea, India, Maldives, Marshall Islands, Myanmar, Solomon Islands, Somalia, and Tuvalu. *Ratifications of C182—Worst Forms of Child Labour Convention, 1999 (No. 182)*, INT’L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:3532434342193878::NO:11300:P11300_INSTRUMENT_ID:312327:NO (last visited June 24, 2012). The U.S. ratified this convention subject to the requirement that it would not require a change in domestic law. Press Release, President Clinton Ratifies the New ILO Convention on the Worst Forms of Child Labor: Promoting Core Labor Standards Around the World (Dec. 2, 1999), *available at* <http://clinton3.nara.gov/WH/New/WT0-Conf-1999/factsheets/fs-013.html>.

¹⁸¹ *Mitchell v. Hornbuckle*, 155 F.Supp. 205 (M.D. Ga. 1957).

¹⁸² *Id.* at 208.

¹⁸³ *See id.* at 212 (explaining that while working at night may not be beneficial for children, § 213 does not address this issue).

¹⁸⁴ *Id.*

Ultimately, the court issued a permanent injunction against the employer to prevent him from hiring any child under sixteen years old during school hours.¹⁸⁵ The FLSA did not permit the court to enjoin the employer from employing children at night.¹⁸⁶ However, this case illustrates one of the major gaps in the FLSA's coverage. Due to its limited protection, the FLSA constrains courts from providing remedies to children who work in agricultural jobs outside of school hours, but still suffer from the negative impacts such labor has on their education.

On the other hand, courts do provide relief where the FLSA's protections are applicable. For example, the Seventh Circuit strictly applied the FLSA's prohibition on children working during school hours in *Mitchell v. McCarty*.¹⁸⁷ In *McCarty*, the defendant employed children between seven and sixteen years as tomato pickers, causing the plaintiff children to miss the first three days of school to work on the farm.¹⁸⁸ The court found that the employer violated the FLSA by employing children during school hours and issued an injunction.¹⁸⁹ However, the court explained that the children were exempt from the minimum wage and overtime laws because they were working in agriculture.¹⁹⁰ The child tomato pickers had no cause of action against the employer for violating the laws regarding minimum wage and overtime payments simply because they worked in agriculture.¹⁹¹ While the outcome in this case was relatively positive for the child workers, it is not likely that any remedy would have been available if the children worked outside of school hours.

Since courts cannot provide judicial remedy to children in agricultural occupations who are paid less than minimum wage or who work overtime, courts focus on whether the children work during school hours.¹⁹² This provision of the FLSA is easy for employers to avoid if they schedule the

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Mitchell v. McCarty*, 239 F.2d 721, 724 (7th Cir. 1957).

¹⁸⁸ *See id.* at 722 (explaining that school resumed September 6, and the record shows that the children worked on Sept. 6, 7, and 8 of that year).

¹⁸⁹ *See id.* (implying the employer did not meet burden of proof to show an exemption under the FLSA).

¹⁹⁰ *Id.*

¹⁹¹ In the FLSA, agriculture has the most numerous and broadest exceptions. *Compare* 29 U.S.C. § 212 *with id.* § 213.

¹⁹² *See McCarty*, 239 F.2d at 724.

children to work outside school hours.¹⁹³ By exploiting this loophole, children's education is harmed in ways that this law was meant to protect.¹⁹⁴

Another potential obstacle to compliance with Article 32 is that the FLSA only applies to child labor in interstate commerce conducted by large enterprises.¹⁹⁵ Even though the FLSA substantially covers a significant amount of scenarios and courts find interstate commerce exists in most situations, the few cases that a court may decide that there is no international commerce prove troublesome. In such cases, children must rely on state laws for protection where interstate commerce is not involved or the enterprise has an annual gross profit less than \$500,000.¹⁹⁶

Unfortunately, not all states offer adequate protection.¹⁹⁷ Illinois, for example, allows children as young as ten to work on farms outside school hours and does not require proof of age.¹⁹⁸ Missouri, on the other hand only allows children fourteen and older to work outside school hours.¹⁹⁹ The disparity in state coverage falls short of a uniform system enacted to protect child laborers' health and access to education.²⁰⁰ Although the reach of interstate commerce is quite wide, there may still be some situations where the FLSA would not apply.²⁰¹ To more fully comply with Article 32, the states must harmonize their legislation and provide enough protection to meet the minimum standard of compliance.²⁰²

¹⁹³ See *Hornbuckle*, 155 F.Supp. at 212 (declining to enjoin the defendant from employing children at night).

¹⁹⁴ Few courts have addressed the purpose of child labor laws, but those who have explain that protecting children is of paramount importance. See *supra* text accompanying notes 170–73.

¹⁹⁵ 29 U.S.C. § 212(c).

¹⁹⁶ Mason, *supra* note 59, at 273; 29 U.S.C. § 218(a). Section 218 provides that a state with laws more stringent than the FLSA must follow the more stringent state law, rather than follow the FLSA.

¹⁹⁷ For an in-depth chart of the minimum ages and hours for children engaged in agricultural occupations, see *State Child Labor Laws Applicable to Agricultural Employment*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/state/agriemp2.htm> (last modified Jan. 1, 2011).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Curtiss, *supra* note 86, at 326.

²⁰¹ Mason, *supra* note 59, at 274.

²⁰² *Id.*

V. ADOPTING A STATUTE WITH ARTICLE 32'S FUNCTIONALITIES WOULD BE BENEFICIAL: A COMPARISON TO THE TORTURE VICTIM PROTECTION ACT

While many states have laws relating to children's rights, most of them are reactive.²⁰³ Passing legislation designed to implement the ideas outlined in Article 32 would improve the protections available to children in agricultural occupations, as well as children who fall under one of the FLSA's other exemptions. Moreover, a domestic statute would provide "hard law" rulings for alien victims of child labor, most of whom probably could not obtain relief elsewhere.²⁰⁴ Implementing such a statute also has the potential benefits of vindicating children's rights, deterring future violations, and providing direct financial compensation to victims of exploitative child labor.²⁰⁵

The Torture Victim Protection Act (TVPA) demonstrates that adopting the text of an international human rights treaty has already been a successful endeavor.²⁰⁶ Congress enacted the TVPA after the U.S. ratified the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.²⁰⁷ This international agreement requires state parties to take measures to prevent torture.²⁰⁸ The U.S. ratified this Convention subject to the reservations that the agreement would not be self-executing and that domestic legislation must be implemented.²⁰⁹ Congress

²⁰³ See Howard Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69, 71 (2006) ("[T]he United States only has narrowly tailored 'rights based' state laws for children.").

²⁰⁴ Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160, 177 (2010).

²⁰⁵ See *id.* (providing a list of potential benefits as they related to using the Alien Tort Statute to improve labor standards).

²⁰⁶ Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

²⁰⁷ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/51 (June 26, 1987).

²⁰⁸ See *id.* art. 2 (requiring state parties to take legislative, administrative, and judicial measures to prevent torture).

²⁰⁹ See *Status of Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV9&chapter=4&lang=en#Participants (last modified June 25, 2012) (providing a complete list of ratifications and reservations for this convention). The TVPA defines torture as:

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

thus passed the TVPA in order to “alleviate some of the jurisdictional difficulties faced by human rights victims”.²¹⁰

The TVPA’s stated purpose is to “carry out obligations of the U.S. under the U.N. Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”²¹¹ The TVPA creates a civil cause of action for victims of government torture, but not private torture.²¹² Most importantly, plaintiffs of any nationality can bring a claim under the TVPA.²¹³ A victim may bring suit in federal courts, provided that he or she has already exhausted all other “adequate and available remedies” in the place where the torture occurred.²¹⁴

The TVPA has been a successful law in many ways. Congress intended for the TVPA to stand as a “clear and unmistakable message that the U.S. will not provide a safe haven to torturers.”²¹⁵ Also, by creating a new civil cause of action for foreign citizens, the TVPA expanded the pool of potential plaintiffs.²¹⁶ Moreover, enacting the TVPA affirmed that the U.N. Charter and the Universal Declaration of Human Rights are binding upon the U.S. as sources of customary international law.²¹⁷ The TVPA’s drafters incorporated a definition of torture found in international law, thereby reinforcing the bond between American and international law.²¹⁸

Courts have also recognized the importance of the TVPA in providing victims of torture with proper jurisdiction and a cause of action. For

Torture Victim Protection Act § 3(b)(1).

²¹⁰ Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement*, 6 PACE INT’L L. REV. 197, 198 (1994).

²¹¹ See generally Torture Victim Protection Act; *Torture Victim Protection Act of 1989: Hearing on S.1629 and HR.1662 Before the Subcommittee on Immigration and Refugee Affairs of the Committee of the Judiciary*, 101st Cong. 30 – 36 (1990) [hereinafter *TVPA 1989 Congressional Hearing*] (discussing the desirability of allowing an alien to seek remedy in U.S. courts).

²¹² Torture Victim Protection Act § 2(a)–(b). The torturer must have been acting under “actual or apparent authority,” or, the “color of law” of any foreign nation. *Id.*

²¹³ Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common Law Suits*, 38 VAND. J. TRANSNAT’L L. 679, 710 (2005). This article also discusses how some victims of terrorism have tried to seek remedy in U.S. courts pursuant to the TVPA. *Id.*

²¹⁴ TVPA, *supra* note 206, § 2(b).

²¹⁵ *TVPA 1989 Congressional Hearing*, *supra* note 211, at 55 (statement of John Shattuck of Amnesty International).

²¹⁶ Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol than Substance*, 43 EMORY L.J. 1467, 1491 (1994).

²¹⁷ Correale, *supra* note 210, at 208.

²¹⁸ See Torture Victim Protection Act § 3(b)(1) (incorporating the definition of “torture” found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

example, in *Hilao v. Estate of Marcos*, the plaintiffs brought a class action suit under the TVPA and ATS against the estate of the former president of the Philippines, Ferdinand Marcos.²¹⁹ The plaintiffs claimed that the Philippine military and paramilitary forces committed human rights violations.²²⁰ The lawsuit was filed in Hawaii, where Marcos and his family had fled to in 1986.²²¹ The plaintiffs were either victims of torture themselves or family members of victims who were executed or “disappeared” as a result of Marcos’ actions.²²² The Ninth Circuit held that jurisdiction was proper and that the estate was liable under the TVPA, even though Marcos himself had not performed the abuse.²²³

In *Kadic v. Karadzic*, the Second Circuit reached a similar conclusion.²²⁴ In *Kadic*, Croat and Muslim citizens of Bosnia and Herzegovina sued Radovan Karadžić, president of the unrecognized Bosnian-Serb entity of “Srpska,” under the TVPA and ATS for crimes against humanity.²²⁵ The plaintiffs alleged that Karadžić should be liable under the TVPA because he acted in his official capacity as the leader of Srpska, or, alternatively, that he acted in collaboration with the recognized nations of Yugoslavia and Serbia.²²⁶ The Second Circuit reversed the trial circuit and held that jurisdiction was proper and the plaintiffs had sufficiently demonstrated that “Srpska” was a state for the purposes of liability under the TVPA.²²⁷

In crafting the language of a domestic statute, Congress should incorporate language and terminology used by the CRC. A “Model Statute” can be found in *Appendix A* of this Note. Just as the TVPA embodied the functionalities of the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, so does the Model Statute. For example, creating a clear definition of “economic exploitation” is crucial for guiding a court’s interpretation and application of the statute. As demonstrated by Judge Posner in *Flomo*, linguistic ambiguities, if substantial enough, can destroy a court’s ability to provide relief to a

²¹⁹ *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996).

²²⁰ *Id.* Most of the facts of the case were discussed at the district court level and the Ninth Circuit simply referred back to such discussion. This Note references the facts as described by the trial court. *See In re Estate of Marcos Human Rights Litigation*, 910 F.Supp 1460 (D. Haw. 1995).

²²¹ *Id.* at 1461.

²²² *Id.* at 1461–62. Approximately 9,541 individuals participated as plaintiffs. *Id.* at 1462.

²²³ *Hilao*, 103 F.3d at 787.

²²⁴ *See generally* *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995).

²²⁵ *Id.* at 237.

²²⁶ *Id.*

²²⁷ *Id.*

plaintiff.²²⁸ The language Congress chooses is especially important here since an American court may be a foreign plaintiff's last chance for judicial remedy.²²⁹

The Model Statute's primary function is to take different bodies of law that already exist and create a private cause of action for victims of exploitative or harmful child labor, regardless of the plaintiff's nationality.²³⁰ To accomplish this, the Model Statute borrows language from the TVPA, the FLSA, and the CRC. Like the TVPA, the Model Statute provides both jurisdiction and a civil cause of action for victims of certain prohibited child labor practices. The Model Statute also incorporates language from the CRC in defining "exploitative" child labor and describing the different types of hazards that can arise in the workforce.²³¹ It is important to use the CRC's language in describing objectionable labor conditions, as the main functionality of Article 32 is to describe how children have a right to protection from such conditions.

The Model Statute also works to fill specific gaps in the FLSA by reinforcing the FLSA's general provision that children under sixteen are ineligible for work.²³² Unlike the FLSA, the Model Statute does not exempt family employment from virtually all regulation, thereby reducing the opportunities for parental exploitation. Moreover, this change ensures that children who are employed as "independent contractors" by their parents are entitled to receive at least minimum wage. The Model Statute also does

²²⁸ See *Flomo*, 643 F.3d at 1024 (explaining that the ambiguities in international child labor law did not provide a basis for the court to determine that Firestone actually did commit a violation).

²²⁹ This is true provided that the TVPA's language and functionalities are incorporated into the domestic statute. See the Model Statute in Appendix A. See Torture Victim Protection Act § (2)(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). Approximately one third of the world's child laborers are located in countries that have not ratified either Convention 182 (worst forms of child labor) or Convention 138 (minimum age). *Facts on Child Labour 2010*, INT'L LABOUR ORG. (Apr. 2010) available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_126685.pdf.

²³⁰ In the Model Statute, the TVPA's language helps create a specific cause of action and provide for appropriate jurisdiction courts of the U.S. See Torture Victim Protection Act § 2 (opening the specific cause of action to foreign plaintiffs).

²³¹ See CRC, *supra* note 11, art. 32(1) ("[R]ecogniz[ing] the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development").

²³² The Model Statute, *infra* Appendix A, § 2(a), uses sixteen years of age as the minimum for most forms of labor. The Model Statute is also consistent with the FLSA's ban on certain types of labor for minors—namely mining and manufacturing.

not create exceptions for children in agricultural employment.²³³ Any type of labor that puts children's safety in danger should be regulated, but this is especially true for agricultural labor, given the high incidence of farming accidents.²³⁴

By omitting most of the FLSA's exceptions,²³⁵ the Model Statute effectively increases the breadth of protection available to child laborers. Congress, in enacting legislation similar to the Model Statute, would bring the U.S. closer to compliance with Article 32. Using the TVPA for guidance proves to be a valuable starting point in the process of enacting a domestic statute mirroring the functionalities of an international human rights treaty. And although the TVPA is not the absolute solution to preventing and ending torture globally, it is certainly a benchmark of U.S. progress.²³⁶ Similarly, enacting the protections of article 32 as a domestic statute would not completely abolish exploitative child labor within the global community. To think so would be highly unrealistic. Rather, such a statute could provide a model for other countries to base their new legislation upon.²³⁷

VI. CONCLUSION

Child laborers around the world, including the U.S., bear the burden of working as cheap labor.²³⁸ As a result of inadequacies in federal and foreign child labor laws, children suffer from physical and mental illnesses, injury, and even sometimes death.²³⁹ Congress should implement a domestic statute embodying the functionalities of article 32 of the CRC because it would establish and recognize the protections therein, as well as mirror emerging norms in international law. Like TVPA, such a law would serve

²³³ The Model Statute treats forms of exploitative and hazardous labor with an equal hand.

²³⁴ *OSHA Fact Sheet: Farm Safety*, U.S. Dep't of Labor, Occupational Safety and Admin. (Sept. 2005), available at http://www.osha.gov/OshDoc/data_General_Facts/FarmFactS2.pdf.

²³⁵ Note that the Model Statute still allows for the Secretary of Labor to make additional findings that certain occupations or machinery is too hazardous for children of a certain age.

²³⁶ See Correale, *supra* note 210, at 220 ("Although [the TVPA] is by no means the end all be all of human rights enforcement, it cannot be dismissed as just a nice gesture on the part of Congress.").

²³⁷ See Matthew H. Murray, *The Torture Victim Protection Act: Legislation to Promote the Enforcement of Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673, 714 (1987) ("[T]he TVPA would provide a model for further legislation defining the extent to which other customary human rights could be adjudicable in U.S. courts.").

²³⁸ See *Children Pay a High Price for Cheap Child Labour*, UNICEF, <http://www.unicef.org/pon95/chil0016.html> (last visited June 24, 2012); Navdip Dhariwal; Ernest Harsch, *Child Labour Rooted in Africa's Poverty: Campaigns Launched Against Traffickers and Abusive Work*, 15 AFRICA RECOVERY 14 (2001).

²³⁹ *Child Labour—India's Cheap Commodity*, BBC NEWS (June 13, 2006), <http://news.bbc.co.uk/2/hi/5059106.stm>.

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as a model for other countries and stand as a powerful vindication of America's commitment to international human rights.

VII. APPENDIX A – MODEL STATUTE

CHILD LABORER PROTECTION ACT

SECTION 1. TITLE.

This Act may be cited as the Child Laborer Protection Act.

SECTION 2. ESTABLISHMENT OF A CAUSE OF ACTION.

- (a) **LIABILITY.**—An employer who—
 - (1) employs a Child under age 16 in Exploitative or Hazardous Labor Conditions shall, in a civil action, be liable for damages to that individual; or
 - (2) employs a Child between the ages of 16 and 18 years in mining, manufacturing, or other occupations declared to be particularly hazardous by the Secretary of Labor pursuant 29 U.S.C. § 203(l) (2006) shall, in a civil action, be liable for damages to that individual.
- (b) **EXHAUSTION OF REMEDIES.**—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
- (c) **STATUTE OF LIMITATIONS.**—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SECTION 3. DEFINITIONS.

- (a) **Child** – The word “Child” means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
- (b) **Exploitative Labor Conditions** – The term “Exploitative Labor Conditions” means labor which, by circumstance, condition, or nature interferes with the child's health, mental development, morals, education, or social development, or labor which pays below the minimum wage per hour in the relevant jurisdiction.

- (c) Hazardous Labor Conditions – The term “Hazardous Labor Conditions” means labor which by circumstance, condition, or nature creates a substantial risk of physical injury or death, exposure to chemicals or other substances which are known to cause harm to an individual’s physical or mental development, entails working with explosives, power-driven equipment, or any other occupations which the Secretary of Labor has categorized as “hazardous” by regulation or declaration.